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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

KIMBERLY LACEWELL BENNETT,

Petitioner,

v.

ALLFIRST BANK, formerly known as
THE FIRST NATIONAL BANK OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether based upon the fraudulent concealment doctrine, did the trial court and Court of Special Appeals err in striking the RICO cause of action, where Allfirst Bank deceptively dishonored thirty-two attorney escrow checks utilizing a system of final payment which knowingly violated federal law (reversal of UCC Paid Items and the aggregating of overdrafts) and not due to the lawful effects of an improperly certified check as pleaded and as discovered in the bank's internal manual and deposition testimony of participating officers of the bank on overdraft duties.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The circuit court's opinion (per Martin Jr., Larnzell) striking the Second Amended Complaint (Appendix ("Pet. App.") 20a-51a). The circuit courts trial ruling (per Lombardi, James) (Appendix (" Pet. App.") 12a-19a). The Court of Special Appeals opinion (per Eyler, James R., Sonner, J., Thieme, Raymond G., Jr., (Retired, specially assigned)) (Appendix ("Pet. App.") 2a-11a), May 29, 2002, unreported. The Court of Appeals denying writ of certiorari order (per Bell, Robert M.) (Appendix ("Pet. App.") 1a), September 12, 2002, unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its order on September 12, 2002, and denied petition for a writ of certiorari. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The provisions of the Bank Fraud Statute, 18 U.S.C.A. §§ 1344(a)(1) and (2), reprinted in the (Appendix (Pet. App.) 52a).

The provisions of The National Bank Act, 12 U.S.C.A. § 21, *et seq.*, relating to embezzlement, is now covered by §§ 656 and 1005 of Title 18, Crimes and Criminal Procedure. Provisions relevant to this petition are reprinted in the (Appendix (Pet. App.) 52a-55a).

STATEMENT OF THE CASE

On October 6, 1995, Respondents' bank officers, after removing over $100,000.00 of federally insured funds for 14 days based on a teller's failure to hole punch" through a certified check, deceptively dishonored 32 attorney escrow checks on Petitioners' "commercial account" accomplished by a known violation of federal law of reversing "UCC Paid items" and aggregating overdrafts as revealed in bank officers deposition testimony and bank manual provisions. The lawful federal effect, of the double posting of the improperly certified check which

removed funds twice for the same check, was a balance remaining in the escrow account sufficient by federal law to pay 31 of 32 dishonored checks. Respondent bank, however, was utilizing two (2) systems of final payment of checks. The "retail system" was compliant with federal law as disclosed in court compelled internal banking manuals produced by defendant approximately **one and a half months after the close of the second discovery period and 19 months after first properly requested**. Under the "commercial system", bank officers were permitted to reverse UCC Paid Items which are federally mandated nonreversible items, which was the direct cause of injury to Petitioner.

The issues of discovery thwarting by Respondent as set forth in this petition at the trial level are extensive, having been heard on 2 occassions, October 20, 2000 and January 10, 2001 by Judge Thomas P. Smith (a third discovery issue was heard on April 24, 2001 at which time Judge Smith was given notice of the federal violation discovered in manuals sought in the Oct.20 and Jan 10 hearings). On October 20, 2000, Judge Smith of the Circuit Court of Prince George's County heard Petitioner's Motion to Compel the banks internal manual and addresses and phone numbers for former bank officers who participated in the return of the checks which were first requested in June 1999, and in nine separate correspondences between September 3, 1999 and April 16, 2001.[1] The correspondances were submitted

1. December 1, 2000 letter , **one (1) month and eleven days after the Court Compelled 15 day production of addresses and phone numbers of witnesses, and one (1) year and six (6) months after first requested (and after Plaintiff had found the witnesses on her own), Defense counsel states:**

> Upon further review of the definitions set forth in your interrogatories, I agree that you requested the telephone numbers of individuals identified by Allfirst Bank. Regarding the individuals identified in the answer to Interrogatory No. 2 Allfirst Bank has the following information. . . . **Allfirst Bank does not have any telephone numbers for Krystal Fadely or Dwight Clarke because it does not possess their personnel files** . . . (emphasis added).

as Attachments to the Petition for Writ of Certiorari to the Court of Appeals (although Respondents' counsel told the Judge Larnzell Martin, ruling on the Motion to Strike Second Amended Complaint at issue in this Petition before this Court that ". . . , the bank responded to the Request for Production of Documents. We got no letter or phone call saying that these are deficient until she filed a motion a year later" (Appendix (Pet. App.) 30a). October 13, 2000 was the first offer by Respondent of less than 10 pages of a 5 volume manual and on October 20, 2001, Judge Smith compelled the entire manual which was produced by Respondent on January 24, 2002.

Petitioner diligently analyzed over **5500** pages of disorganized manual provisions produced by Respondent on January 24, 2001 and discovered that Respondents unlawful activities (reversal of UCC Paid items) were concealed, by the guise of the effects of an improperly certified check, creating an "insufficiency of funds" to pay 32 attorney escrow checks. On her own, Petitioner further found key branch officers associated with the "improperly certified check" and who participated in the return of the 32 checks and deposed them in the needed sequential order as Petitioner dealt with each one personally regarding the events at issue in this case.

Through the deposition testimony and manual provisions disclosed below, Petitioner discovered that the " corporate or commercial system" permitted security licensed branch officials to reverse items federally mandated for payment in a deliberate and consistent course of conduct. But for this federal law violation, funds remained in the escrow account to pay 31 of 32 of the dishonored checks even after the banks officers misappropriated for 14 days over $100,000.00 of Attorney trust funds based on a "hole not being punched" by defendant bank's teller. As submitted in the Petition to the Court of Special Appeals, two (2) of the thirty-one checks returned under the deceptive unlawful system of final payment were checks whereby Respondent Bank was also depository bank and dishonored their own checks, further implicating the

"scheme to defraud" clause of the bank fraud statute which requires that the defendant engage in a pattern or course of conduct designed to deceive federally chartered or insured financial institution into releasing property, with intent to victimize institution by exposing it to actual or potential loss.

BR-1297 "retail accounts" – bank's internal manual provisions:

Pertinent Uniform Commercial Code Rule

UCC Paid Items When the first debit is returned, the amount is Added (Temporarily for overdraft considerations) Back into the balance.

All subsequent items are reevaluated to see if they become payable due to the previous item(s) being returned. If the item is paid, it is a "UCCpaid item".

UCC Paid Items are must pay, nonreversible Items.

Following are relevant portions of depositions as transcribed:

February 14, 2001 – Deposition of Reginald White-Branch Manager

Q. Now, Mr. White, is it again true that based on the UCC Paid items law and based on my statement that you have in front of you, that 31 of those 32 checks would have been paid on my escrow account?

A. It appears that it would have cleared.

Q. So in your opinion, Mr. White, why did 31 of 32 checks bounce on my escrow account?

A. The items were returned because the amount that was presented against the account exceeded the amount in the account and the system made a decision to have the items returned.

February 12, 2001 – Deposition of Amelia Holland- Market Manager

Q. In addition to that $104,819.56 that was taken out of my account, when those checks were sent back as "uncollected",

there was additional money that was in my account that could have covered those checks, is that correct?

A. All of the items together, there weren't sufficient funds to pay all of the items.

February 12, 2001 – Deposition of Krystal Fadely – Teller who improperly certified check

Q. Did Reggie ever say to you that internal controls would have to fix your error in the certified checks?

A. Yes. I remember him saying there was nothing I could do personally. So maybe I made the assumption they were going to fix it themselves, I don't know, but I know that he told me there's nothing that I personally can do to fix it. Now, who was going to fix it. I don't know. I presuming it was internally.

Q. And you knew that because Reggie told you that?

A. Someone told me that, yes. I didn't say Reggie. I said someone told me that. It may have been Dwight [2], it may have been whoever. But I do remember knowing that there was nothing I could do.

After receiving Court compelled manual documents and deposing participating bank officers, Petitioner filed the second amended complaint alleging RICO on April 4, 2001, 2 months and 11 days after receiving **5500 pages of disorganized production of documents which disclosed the federal law violation, and 43 days prior to trial.** In addition to being threatened with a Motion for Sanctions by Respondents' counsel for the filing of the RICO cause of action, the following is

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2. Affidavit of Nancy A. Miller in Response to Plaintiff's Requested For Production of Documents – produced at the October 20, 2001 hearing on Motion To Compel:

> . . . 2. Allfirst Bank has made a comprehensive and thorough search for the employment files of the five persons employed by the bank in October 1995 and requested in Plaintiff's Document Production Request. None of these persons are still working for the bank. After review of many boxes of historic records, we are unable to locate the employment files of Dwight Clarke and Crystal Fadely.

contained in a letter to Petitioner and Co-Counsel from Respondents' Counsel on April 24, 2001.

"The plaintiff held a commercial account. Section BR-1165 governs overdraft procedures for commercial accounts. See Section BR-1165 attached hereto. There is no concept of a UCC Paid item for Commercial accounts, and there is no evidence that Allfirst Bank employees deviated from Section 1165 in any manner."

In fact, Allfirst's position that the Uniform Commercial Code Paid items was not applicable to "commercial accounts" was changed to reflect compliance with the federal law requirement in September 1998, the month this litigation ensued which was revealed in the court compelled production of documents.

11.5.1-Automated Overdraft System (BRC)
September 1, 1998
Overview

This section describes the Automated Overdraft System . . . This system is used to decision both Retail and Commercial Overdrafts.

Each customer's (retail or commercial) overdraft is reviewed. . . The branch has the final authority and may reverse the recommended decision, unless it is a must pay item.

System Definitions

. . . UCC Paid Items

When the first debit is returned, the amount is added (temporarily for overdraft considerations) back into the balance. All subsequent items are reevaluated to see if they become due and payable due to the previous item(s) being returned. If the item is paid, it is a "UCC paid" item. This is an automatic process and decisions can not be reversed.

April 26, 2001 – Deposition of Barbara Puccio – Regional Operations Officer deposed over Motion for Protective Order, 24 days prior to trial

Q. Back in 1995, October 1995 for Commercial was there a screen to be assessed by computer for reviewing overdrawn commercial accounts in the branch?

A. Yes.

Q. And did that screen individually list the paid disposition for the checks presented?

A. I'm sorry. I don't understand. Are you talking about a predisposed answer as to whether the check should be paid or returned.

Q. Correct. I'm talking about —

A. Corporate accounts there are no displayed recommended decisions. They're handled differently from our-they were at that time handled differently.

Unlike the Retail Overdraft System which incorporated federal law compliance in the overdraft system, the bank's directors gave security licensed and in this case former security licensed bank officers, the ability to violate federal law as disclosed by Barbara Puccio Regional Operations Officer.

Q. When overdrawn checks come in on a commercial account, does the computer reach a decision as to whether its going to pay those checks or return those checks?

A. You're talking about corporate or retail?

Q. I'm talking about the commercial side.

A. No. A branch makes a decision to pay or return.

Q. A branch makes the decision to pay or return?

A. – or whoever is reviewing them.

Q. And what is the rationale in the branch making the decision to pay or return? Do you know? Can you answer me?

A. The branch reviews them because generally they're accounts that they would be most familiar with. And they would be the ones that you would want deciding whether or not to pay or return checks.

Q. Based on October 6 before any checks that were presented against my account came back, there was a balance in my account of $65,555.08.

A. Uh-huh

Q. When 32 checks totaling approximately $40,000 from $34,745.96 down to $25, you sitting on overdraft review for that day, how are you going to determine what checks don't get paid?

Q. Again, I would look at the relationship of the customers account. I would factor in a lot of different things, do I know this customer. I don't know how best to answer your question. It's based on a lot of different things.

Q. Is it based on how much money I have in my account at the time these checks are presented?[3]

A. It could be Obviously, there wasn't anything in your account when the checks were presented. It overdrew your account.

Q. So a person sitting on the Commercial Overdraft reviewing the facts of my bank statement before them, what will determine whether they pay any of these checks?

A. As I stated before, its based on a number of things, the dollar amount of the overdraft, how long the account has been opened, the other relationship that the bank might have with the customer —

Q. The dollar amount of the total overdrafts or the dollar amount of each overdraft?

A. It could be any of that. I can't answer to any specific – I mean, those are general things that are gone by. Each overdraft is a different case. And I can't tell you what was in the mind of any person decisioning an overdraft on any day.

A look at the record before the trial court reveals the deceptive nature of the concealment of this federal violation:

Defendant's Answers To First Set of Plaintiff's Interrogatories

Upon information and belief, the employee of First National Bank who certified the check at issue in the above-captioned action failed to punch a hole indicating that the check had been certified. As a result, the check was posted to the Plaintiff's account a second time in the normal course of business causing the account balance

3. Comments to § 4-402- Wrongful dishonor mandates payment based on account balance only.

to appear lower than it actually was. Checks received by First National Bank on the night of October 6, 1995 written on the Plaintiff's account were returned marked "uncollected"

Petitioner's Second Amended Complaint filed on April 4, 2001, paragraphs 1-56 pleads fraudulent concealment and an execution of a scheme to defraud a federally chartered and insured financial institution as follows, despite Respondents' defense counsels espousing to Judge Larnzell Martin in the Motion To strike Second Amended Complaint that "no facts were plead " (Appendix (Pet. App) 29a).

39. Defendant Bank, by and through counsel has maintained and continues to maintain that the 31 checks were returned due to the double posting of the improper certified check causing the escrow balance of $65,555.08 to be insufficient to pay any of the 31 checks presented for payment on October 6, 1995.

42. After the January 10, 2001 Motions Hearing, plaintiff received Court Compelled production of documents (**1 year and 7 months after the initial dispatching of the request to defendant**) consisting of defendants Banking Policy Manual. At this time it was discovered through defendants Banks own policy provisions of the overturning of defendant Banks Automated Overdraft System based on the specific criteria of Uniform Commercial Code law pertaining to financial transactions. Per the policy provision, the computer (assuming the **$65,555.08 statement balance** was in fact in plaintiffs account after the double posting of $104,819.56) would have returned only 1 check, paid 30 checks **and left a residual balance $20,241.01 in the escrow account** . . .

43. . . . Defendant Bank and employees of defendant bank knowingly, willfully and/or recklessly misappropriated escrow funds with the intent to deceive the plaintiff by the "smoke screen" of the improperly certified check double debiting to plaintiffs escrow account (which improper certification would have only resulted in 1 check legitimately being dishonored.

44. The misappropriation of escrowed funds was accomplished by a reversal of "UCC Paid" item and/or conversion. Defendant bank knowingly and willfully diverted, misappropriated and misapplying the escrow funds, by means of deceitful means, artful practices and false pretenses, representations and promises. Defendant Bank knowingly and willfully and/or recklessly aided and abetted employees in taking, diverting, misappropriating and misapplying the plaintiffs' property.

45. The sole rationale for the defendant's failure to handle the check in question properly, failure to correct the error, and/or other means of conversion by defendant's agents is the defendants' receipt of benefit from a pattern of racketeering activity and the use or investment of this benefit in an enterprise, the operations of which injured plaintiff and misappropriated not only $104,819,56 but $65,555.08 which would have paid 30 of 31 of the escrow checks with a residual of $20,241.01.

50. Defendant Bank under false pretenses, knowingly, willfully and/or recklessly assessed $426.98 in November, 1995 for bounced check fees and refused to return erroneously assessed bounced check fees back until March, 2000 (**4 years and 4 months**) later. Causing plaintiff to have to write a check to escrow client out of plaintiffs own personal funds for defendant Banks misappropriation of plaintiffs money and property.

Nancy Miller, General Counsel for Allfirst Bank, endorsed and caused to be mailed through the US Postal service letters to attorney trust clients letters espousing the false pretense of "the mistaken posting of a check for $104,819.56 to her account twice" created by the effect of the hole not being punched in the improperly certified check as the legitimate cause of the 32 items returned.[4] This letter sent through the US Postal service supports

4. Nancy Miller, General Counsel, Allfirst Bank letter dated November 6, 1995:

> As payee of or person interested in a check recently written on the Escrow account of Attorney Kimberly Lacewell

(Cont'd)

the second predicate act (Mail Fraud) required to support the federal RICO causes of action introduced in the second amended complaint under Section 1962. A Plaintiff under Section 1962 is allowed to proceed if it demonstrates defendant's receipt of income from a pattern of racketeering activity and the use or investment of this income in an enterprise, the operations of which injures plaintiff. *Busby v. Crown Supply*, 896 F.2d 833, 838-840 (4th Cir. 1990).

Allfirsts' General Counsels letter in addition to the espousing of a false pretense for 31 dishonors, (i.e. the effects of an improperly certified checks double posting twice to the account instead of UCC Paid Items reversal) further concealed violations of federal law (Reg CC) 12 CFR § 229 and was crucial to the banks thwarting of producing the address and phone number for Dwight Clarke as follows:

(1) "you may have experienced a problem with payment of checks presented on October 6, 1995" Per Dwight Clarke's testimony, whom Petitioner located on her own in December 2000 through diligent search, after the bank refused to provide last known address and

(Cont'd)

> Bennett at the First National Bank of Maryland, you may have experienced a problem with payment of checks presented on October 6, 1995. Checks returned unpaid by First National on the evening of October 6, 1995, were returned in error due to the mistaken posting of a check for $104,819.56 to her account twice. Specifically, the double posting occurred because of a clerical oversight in failing to punch a hole through the account number in the MICR line of the check at the time it was certified by the bank. First National sincerely regrets the error and any inconvenience it may have caused you, as well as Attorney Bennett. Please accept First National's apology for the problem. The processing of these checks should not in any way reflect poorly on Attorney Bennett, as she has always maintained sufficient balances to honor the checks written
>
> . . .

telephone number due to "loss of his personnel file", when deposed revealed that checks were actually being returned over a 2 to 3 day period.

January 9, 2001 – Deposition of Dwight Clarke – Financial Services Representative

Q. Mr. Clarke, you did not call me after the nonpayment?

A. Afterwards, on the second day of more checks coming in to be returned, it was at least two days that we were getting checks that were going to be returned. So it was prior on the first day to returning it. . ."

Q. So you're saying it was more than one day?

A. Right, it was more than one day.

Q. Checks coming in on consecutive days?

A. I'd say two days, possibly three days.

Q. Sir, you were calling me everyday checks were coming in?

A. Right. At least – that's why I say at least once the next day. It wasn't like it was a one time thing. I was trying to get a hold of you.

In fact, a list of the 32 checks reveal three presentment dates by payee banks, October 3, October 5 and October 6 as disclosed in Dwight Clark's deposition testimony. Without the aggregating of overdrafts checks could only have been legitimately returned on the night that the largest check of $69,064.94 was presented for payment because that is the only check larger than the $65,555.08 balance. The **combined total** of the 31 other checks returned was $44,609.57.

Mr. White ,being deposed after Dwight Clarke was found by Petitioner and deposed, was asked the following series of questions concerning Petitioners October **bank statement** concerning the day of presentment of the checks. **Petitioners Bank Statement reflected one date October 6 as presentment thus implicating 18 U.S.C.A § 1005 Bank entries, reports and transactions for false entries in "any book, report, or statement of such bank"**:

Q. Mr. White, can you comment as to Mr. White's testimony that checks were coming in —

A. I can't comment.

. . . To. My recall, they were done on one day and not multiple days.

Q. So Mr. Clarke's sworn deposition testimony is inaccurate?

A. I can't speak to that. If that what he recalls, I have no idea what he's referring to. I can refer to what I see here in front of me, **that items were presented on one day and returned on the same day.** (emphasis added)

Mr. White's testimony as to items presented on one day and returned on the same day is alluding to the federal requirement of same day settlement for local items. **An analysis of every attorney escrow check written from the inception of the escrow account reveals some egregious final clearing practices. For purposes of the events at issue in this litigation, same day settlement was given to each and every Montgomery County government check written from Petitioners escrow account without exception. However, Prince George's County government used the exact same depository bank and as evidenced by the non-payment of checks as small as twenty-five dollars ($25.00) and sixty-nine dollars ($69.00) with an escrow balance of $65,555.08, were subjected to unlawful redlining in their clearance. Checks for the government of the District of Columbia were cleared in the same fashion as Prince George's County government checks with the exception that none were ever returned as unpaid.**

October 6 account balance					$65,555.08
Check #	Depository Bank, City, State, and date	Cleared		Amount	Designation
1518	Riggs National Bank, Wash, DC	**Oct 5**	**Oct 6**	$69.064.94	NSF
1540	Chevy Chase Bank, Laurel, MD	**Oct 5**	**Oct 6**	$34,745.95	Uncollected
1519	Citibank, FSB, Wash, DC	**Oct 5**	**Oct 6**	$ 2,460.00	Uncollected
1490	First National Bank of Maryland	**Oct 6**	**Oct 6**	$ 2,300.00	Uncollected
1535	Nationsbank, Baltimore, MD	**Oct 5**	**Oct 6**	$ 405.62	Uncollected
1530	Nationsbank, Baltimore, MD	**Oct 3**	**Oct 6**	$ 152.00	Uncollected
1487	Citizens Bank of MD, Laurel, MD	**Oct 3**	**Oct 6**	$ 150.00	Uncollected
1501	Citizens Bank of MD, Laurel, MD	**Oct 3**	**Oct 6**	$ 150.00	Uncollected
1512	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1467	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1448	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1412	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1382	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1370	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1390	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1523	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected

1532	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1478	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1346	Citizens Bank of MD Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1434	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1422	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1546	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1499	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 130.00	Uncollected
1543	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 125.00	Uncollected
1485	Nationsbank, Baltimore MD	**Oct 6**	**Oct 6**	$ 124.00	Uncollected
1510	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 123.00	Uncollected
1529	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 69.00	Uncollected
1483	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 25.00	Uncollected
1509	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 25.00	Uncollected
1494	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 25.00	Uncollected

The Court of Special Appeals in affirming the trial court's striking of the Second Amended Complaint as barred by the statute of limitations and prejudicial to the bank to require it to prepare a defense to the RICO charges when the trial was scheduled for the following week, never mentions why RICO was filed as set forth from the bank's own internal manual provisions at oral argument, nor does it mention that the checks were not lawfully dishonored by the effects of the double posting of the improperly certified check as falsely pleaded but due to the reversal of UCC Paid items and the aggregating of overdrafts in violation of federal law. Further, in affirming the trial court's decision, the Court of Special Appeals stated that the Second Amended complaint was filed long after the close of discovery and one week before trial. Even though the Court was in error in that the Second Amended complaint was filed April 4, 2001, 43 days prior to trial, the timing of the filing due to Respondent's thwarting of discovery was exactly the question asked on appeal to the Court of Special Appeals and Court of Appeals. Even though the federal violation was discovered in the "retail" provisions of the manual, both courts chose to remain fully and completely silent on the discovery abuses complained of at the trial court, sanctions for which remained unheard by the trial court prior to trial for nonproduction of sections of the "retail" provision of the manual compelled and deemed by Respondent **after court compelled** to be "irrelevant".(See Footnote 4 referencing Second Supplemental Answer to Plaintiff's Interrogatory No. 2, filed by Respondent May 8, 2001- 13 days before trial) Further, the Court of Special Appeals opined on a different question than was presented by Petitioner.

The question presented by Petitioner was: Did the trial court err in dismissing the Plaintiff's Second Amended Complaint filed over 30 days prior to trial, on the grounds of the statute of limitations and prejudice to the Defendant when the prejudice (if any) was created by Defendant's thwarting of request for production of documents? Instead, the Court of Special Appeals opined on a very different question, which removed all issues of the thwarting of discovery by Defendant and is no where

dealt with in their opinion as follows: Whether the trial court abused its discretion in striking Mrs. Bennett's second amended complaint on the ground it would prejudice defendant? (Appendix (Pet. App.) 2a-11a)

These discovery abuses that the Court failed to acknowledge in their opinion, was discussed at length in the petition, argued before them and was crucial to the determination of the timing of the Second Amended Complaint which the Court of Special Appeals affirmed as being prejudicial and statutes of limitation barred.

The trial court judge, Thomas P. Smith, who heard 3 hearings on discovery issues related to the facts at issue in the discovery abuses claimed by Petitioner stated in the April 24, 2001 motions hearing in which he received notice of the federal violation of reversals of UCC Paid items on Petitioners' account stated that he would personally resolve the Motion to Strike the Second Amended Complaint.

Judge Smith, however, deferred ruling on the Motion to strike the Second Amended Complaint to Judge Lamzell Martin, after stating in open court that he was to personally rule on the matter. Judge Smith had heard three (3) discovery motions hearings for discovery issues including, affidavits of "loss of personnel files" (Krystal Fadely and Dwight Clarke), failure to provide addresses and phone numbers of participating bank officers, and delay in the production of the compelled manuals.More importantly, Judge Smith knew and espoused that the dishonors as pleaded by Respondent was due to the hole not being punched in the certified check as commented to in the October 20 and January 10 motions hearings. Commenting

The Court:

All right. That is all the facts they have. That is all the facts they will be entitled to proceed with, as when and if this case is resolved. The fact that you believe there are other facts, that they are hiding things, and I get that from, from, from the sentence rather than from anything you have said, is a matter you and the finder of fact, be it a judge or arbitrator, will have

to resolve. . . The are not going to be able, in the phrase of Walt Garrison however, to stray off the ranch.

Judge Smith learned in the motions hearing on April 24, 2001 that the true cause as revealed by the banks own policy manual was reversal by bank officers of UCC Paid items which are federally mandated on Petitioners Commercial Account and not the lawful effects of an improperly certified check, yet despite his familiarity with the facts he deferred a decision on the Motion to Strike the Second Amended Complaint to Judge Larnzell Martin, who was unfamiliar with the discovery issues of this case.

Judge Larnzell Martin, unfamiliar with the discovery thwarting, but familiar with both the reversal of UCC Paid Items as presented in the Second Amended Complaint and exhibits to the Second Amended Complaint and the allegation by Petitioner of Bank Fraud (Appendix (Pet App.) 26a), hearing the Motion to Strike the Second Amended Complaint asked for Respondents' defense counsels response to the dual system of final payment and incredibly struck the complaint as prejudicial after hearing the following:

Defense Counsel

Your Honor, the issue about these dual systems. The Plaintiff somehow suggests that it is – it is relevant. The Plaintiff herself said, I Didn't know about the UCC requirements until some years after I filed the complaint. That is not the banks problem that she didn't know that."

The violation of the UCC was discovered in the retail overdraft section of the manual, yet the trial court prior to trial left unheard a Motion for Sanctions for failure of Respondent to comply with the courts October 20, 2000 order to compel the entire manual. The piecemeal approach of Respondent to hinder legitimate discovery requests is shown by the Second Supplemental Answer to Plaintiff's Interrogatory No. 2 filed

May 8, 2001 (13 days before trial) concerning outstanding portions of the manual[5]

This type of litigation strategy was employed from the outset of litigation and was condoned by the trial court. The trial court in fact never addressed the Motion For Sanctions for the October 20, 2000, court compelled teller settlement records of Krystal Fadely, which by law they must retain, which would show the federal settlement requirement of the second improper debit caused by the improperly certified check, which was the guise and false pretense used to legitimize the removal of Attorney client funds in the custody of a federally insured institution.[6] [7] [8]

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5. The Defendant, First National has located Sections BR-097A and BR-097B of the 1995 Allfirst Policy Manual and is producing copies of the same herewith . . . The remaining sections that plaintiff seeks, sections 1328, 1328 A and 1328 B, relate to retail checking accounts. The Plaintiff held a commercial checking account with Allfirst Bank and these sections are inapplicable and irrelevant."

6. October 13, 2000 defense counsel letter:

"Finally with regard to teller reports that you are seeking, your request does not give Allfirst Bank adequate notice of the type of report which you seek. Regardless, there are no reports prepared by tellers which have any relevance to this matter."

October 20, 2000 Motion To Compel Hearing:

The Court: You do not need all daily or weekly reports for the teller working at the office at issue

Ms. Bennett: Just Crystal Fadely

The Court: At best you need just one.

Ms. Bennett: Yes Sir. Just Crystal Fadely.

7. Defendant's Response to Plaintiff's Second Request For Production of Documents dated November 2, 2000:

Response: Subject to the foregoing objection and pursuant to the Plaintiff's statement in open Court that she seeks only reports relating to Krystal Fadely, the Defendant, First National, states that it will produce for inspection and copying any and all reports that it can identify, in its possession or control, for the month of October 1995 for the branch in question.

8. May 8, 2001 **(13 days before trial)**

Defendant's Supplemental Response to Plaintiff's Second Request For Production of Documents: (Cont'd)

Further, Judge Larnzell Martin struck the Second Amended complaint in its entirety including the cause of action for the Maryland Consumer Protection Act specifically enacted for unfair or deceptive trade practices of the UCC (Appendix (Pet App) 32a) and thus foreclosed Petitioner from refuting the trial judge's finding noted as follows:

(Appendix (Pet. App.) 13a)

The Court:

— so I do not see any deception. I do not see any intentional fraud or anything of that nature . . .

(Appendix (Pet. App) 15a)

The Court:

In this case the bank made a mistake by failing apparently to punch a hole in a check which would have identified it as a certified check. This check was presented to the bank by plaintiff, Kimberly Bennett. It was in the amount of $104,819.56.

And it was debited to her account twice, which caused severe overdrafts in her escrow account

In fact the trial Court, evidenced by its opinion was quite confused about the improperly certified check's effect on the escrow account (Appendix (Pet. App.) 15a)

The Circuit Courts' determination to remove this case statistically from their docket instead of giving a continuance to afford Respondent a right to answer the Second Amended

(Cont'd)

> The Defendant, Allfirst Bank has reviewed its files regarding the Plaintiff's request. There are no daily or weekly reports prepared by tellers. There is a ticker tape that is prepared mechanically as the teller enters transactions throughout the day. The ticker tape does not contain any decipherable language as the information input onto the tape is recorded in a code. All relevant information is then transferred from the tape into account records of various bank customers. All relevant account statements have been produced and are in the record in this matter. Allfirst Bank has been unable to locate the (ticker)?? Tape for Crystal Fadely from October 2, 1995.

Complaint for the federal law violation can best be seen from Judge Smith's January 10, 2001 (prior to production of the Manuals) comments:

The Court:

. . . Now I know Counsel is familiar with the Court's continuance policy. I want to go over it with you. Do you understand the Court's continuance policy?

Ms. Bennett: No, Your Honor.

The Court: Succently stated, if you have a pulse, you have a trial. We do not continue cases period.

Ms. Bennett: Yes, Sir.

The trial Court denied the Second Amended Complaint and allowed trial to proceed only on the damages issue of Section 4-402 Wrongful Dishonor for which Respondent had admitted liability for wrongful dishonor.

The Court of Special Appeals, having an affirmative **duty** based on the law to reverse trial courts rulings that are clearly erroneous and was substantiated by the banks own policy provisions of the violation of federal law, affirmed the trial courts prejudicial finding and further added a statute of limitations bar refusing to recognize the Fraudulent Concealment Doctrine applicable to the RICO cause of action, i.e. that the 32 dishonors were not legitimately caused by the effects of an improperly certified check as pleaded by the Respondent and answered in interrogatories but were the true result of reversal of UCC Paid Items- federally mandated items (said pleadings and interrogatories answered *after the Federal Compliance of making UCC Paid items irreversible by bank officers on Commercial accounts thus negating any prejudice in having to defend against the Second Amended Complaint filed 2 years and 7 months after the subsequent remedial measure was enacted.*) The remedial measure shows that with federal compliance, 31 checks would have been paid irrespective of the results of an improperly certified check used as a guise to take property from a federally insured institution by false pretenses. The law of the UCC did not change since 1995,

Respondents' compliance with the law changed. However, as discussed in **Reasons for Granting the Writ**, Respondent continues to contend that in 1995, $65,555.08 was "insufficient" to pay 31 checks totaling $41,609.57. And the Court of Special Appeals sanctioned this as legitimate when they found "On October 6, 1995, the bank returned a series of thirty two checks written on Mrs. Bennett's account as unpaid because there were insufficient funds in her account to cover the checks" (Appendix (Pet. App.) 4a). This premise is final payment based on aggregating overdrafts as bank officers testified was the system employed by the bank in 1995 and was a willful and deliberate federal violation of "final payment". With the gravity that is before Respondent and those perpetrating this fraud involving funds in the custody of a federally insured institution, Petitioner now fully recognizes the great lengths which have been resorted to in concealing this "Corporate Corruption" perpetrated upon unknowing consumers such as herself.

REASONS FOR GRANTING THE PETITION

The trial court and the Court of Special Appeals, in ruling prejudice and the Statute of limitations bars have confined a federal right (RICO) within the terms of a state statute of limitations and refused to acknowledge and sustain the federal equitable doctrine as to fraud. The Supreme Court has stated that the fraudulent concealment doctrine is to be "read into every federal statute of limitation." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). As in *Holmberg,* this case raises a question of considerable importance in enforcing liability under a federal equitable enactment involving admitted violations by bank officers of a system of reversing UCC Paid items and the aggregating of overdrafts in violation of federal law and thus, The National Bank Act. The judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Banking Act involve decisions of a "federal" and not a "state question." 12 U.S.C.A § 21 *et seq*.

To insure performance of these duties and as a safeguard to creditors and the public, violation of

> the provisions of the Act by any director or officer of the bank or by any person aiding or abetting him, is made a criminal offense,12 U.S.C.§ 592, 12 U.S.C.A. § 592, **Section 592, R.S. § 5209; Acts Sept. 26, 1918, c.177, § 7, 40 Stat. 972; Aug. 23, 1935, c. 614, § 316, 49 Stat. 712, relating to embezzlement, is now covered by §§ 334, 656, and 1005 of Title 18; Crimes and Procedure (§§ 656 and 1005 printed in Appendix(Pet. App.) 52a-55a)**, and in the event of such violation, the association may be required to forfeit all its rights and privileges,12 U.S.C. § 93, 12 U.S.C.A. § 93.
>
> Bank directors have a duty to act as prudent and diligent persons would act in safeguarding the bank's property, complying with state and federal banking statutes and determining that bank officers run the bank properly and are held to stricter rules since banks handle depositors money. *Briggs v. Spaulding*, 141 U.S. 132 (1891)

Review should be granted because of the importance of this violation to the National Bank Act (12 U.S.C. A. § 21 *et seq.*) which constitutes "by itself a complete system for the establishment of national banks." *Cook County National Bank v. United States*, 107 U.S. 445 (1882) In addition to the sections of the act conferring on national banking associations the authority to conduct a public banking business, the Act contains numerous provisions designed for the protection of bank depositors and creditors. Allfirst Bank, formerly known as First National Bank of Maryland, at the time of the events at issue, was a national bank subject to, and governed by the National Bank Act.

> 18 U.S.C.A. § 1344(a) reads:
>
> Whoever knowingly executes, or attempts to execute, a scheme or Artifice —
>
> (1) to defraud a federally chatered or insured financial institution;

> (2) or to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years or both.

Secondly, review should be granted because "sufficiency" of funds for final payment is a federal question. And as the question of whether $65,555.08 was "insufficient" per the pleadings of the Respondent to pay 31 checks totaling $44,609.57 is determined by federal law, when the period starts to run for statute of limitations purposes under RICO is also a federal question.

Respondent in Allfirst's Answer to Petition for Writ of Certiorari to the Court of Appeals of Maryland, none-the-less continues the espousing of the violation of federal law in final payment as legitimate:

> As set forth, above, Allfirst has always admitted that it wrongfully dishonored checks written on the Petitioners Account. Allfirst has maintained that by failing to punch a hole in the MICR line in the certified check, that the Petitioner's account was improperly debited twice for the same check, thereby causing the artificially low balance and wrongful dishonors that should have been paid. The trial court also specifically found that Allfirst's failure to punch the hole proximately caused the checks to be dishonored. (Allfirst's Answer to Petition for Writ of Certiorari to the Court of Appeals page 13)

They further state under *UCC issues raised in the Petition* (Allfirst's Answer page 13)

> If the Petitioner is correctly stating the UCC requirements, she is simply stating another basis

> upon which it can be found that Allfirst wrongfully dishonored checks 2-32. Allfirst has always admitted that it wrongfully dishonored checks 2-32, as well as the first check. **It is irrelevant whether or not there is a second explanation for why the dishonors were wrongful.** (emphasis added)

Respondent's disrespect for federal law is evident in their cavalier disposition that the deliberate and consistent violation of federal law and reversing of UCC Paids is merely an explanation. An explanation is an understatement as to the accounting this Corporation owes this Court, Petitioner, and all commercial account holders affected by a system which willfully violated federal law. Moreover, General Counsel in the case of Petitioner used the U.S Postal service to send letters to clients using a false pretense to conceal this federal violation which obtained money in the custody of a federally insured institution in violation of the Bank Fraud Statute, 18 U.S.C.A. § 1344(1) and (2). I would also like to remind the Court that Allfirst Bank is the Corporation where another security licensed individual, foreign trader, John Rusnik, lost million dollars of the bank's money based on the "lack" of internal controls employed by the bank. Petitioners case represents "known violation" of law as evidenced by their compliant Retail System which made UCC Paid items irreversible in 1995.

The validity of final payment as deceptively pleaded by defendant and upheld by the trial court and the Court of Special Appeals is repugnant to federal law, and therefore a substantial federal question was presented in the Second Amended Complaint. The United States Supreme Court, in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), established its power to review state court decisions in cases involving matters of federal law. The Court of Appeals Opinion (Appendix (Pet. App) 4a) states:

"On October 6, 1995, the bank returned a series of thirty-two checks written on Mrs. Bennett's account as unpaid because there were insufficient funds in her account to cover the checks"

This gives validity to the banks noncompliance with federal law in the reversals of UCC Paid items on Petitioners Escrow account and the unlawful system of aggregating overdrafts as deliberately and consistently employed by the officers of the bank in violation of the National Bank Act.

As in the case at issue, the purpose of the fraudulent concealment doctrine is "to prevent a defendant from ' concealing a fraud, or . . . committing a fraud in a manner that it concealed itself until the defendant' could plead the statute of limitations to protect it." *Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 122 (4th Cir. 1995). The discourse of Respondents' counsel, in the hearing on the Motion to Strike the Second Amended complaint, regarding the very issue invoking this rule is found in (Appendix (Pet. App.) 29a-30a).

> Where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute of limitations does not run until the fraud is discovered though there be no special circumstances or efforts on the party committing the fraud to conceal it from the knowledge of the other party." *Bailey, Assignee v. Glover*, 88 U.S. 342, 348 (1874)

In *United States v. Morgenstern*, 933 F.2d 1108 (2d Cir. 1991), the Court found that the federal bank fraud statute applies to taking of property from banks by false pretenses, whether that property includes funds maintained in bank accounts for customers or property over which bank has physical control. 18 U.S.C. (1988 Ed.) § 1344(2). Two major considerations emerge from the legislative history of the federal bank fraud statute. First, Congress expressed an intent to "protect [] the financial integrity of these institutions, and . . . assure a basis for the Federal prosecution of those who victimize these banks through fraudulent schemes." S. Rep. No. 225, 98th Cong., 2d Sess. 377 (1983), reprinted in, 1984 U.S. Code Cong. & Admin. News 3182, 3517; see H.R. Rep. No. 901, 98th Cong., 2d Sess. 2-6 (1984) *United States v. Blackmon*, 839 F.2d 900, 905-06

(2d Cir. 1988). It was Congress' intent that a federally insured or chartered bank must be the actual or intended victim of the scheme. *See United States v. Morgenstern*, 933 F.2d. 1108, 1112 (2d Cir.1991); *Blackmon*, 839 F.2d at 906.

The Court in *United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992), *cert. denied*, states

> This much is clear: a conviction under the "scheme to defraud" clause of the bank fraud statute requires that the defendant engage in or attempt to engage in a pattern or course of conduct designed to deceive a federally chartered or insured financial institution into releasing property with the intent to victimize the institution by exposing it to actual or potential loss.

In *Quick v. Peoples Bank of Cullman County*, 993 F.2d 793 (11th Cir. 1993), the Court found that the "bank was liable based on *respondeat superior* doctrine for loan officer's violation of federal Racketeer Influenced and Corrupt Organizations Act, even if bank was initially unaware of violations, where violations were incident to loan officers assigned duties and took place during bank business hours, officer had been assigned function of making loans and wrongful activities, bank acquiesced in violations by requesting that debtors sign consolidation note including amounts fraudulently taken by loan officer, and accepted benefit of wrongful activities by keeping interest on additional debt incurred by debtors.

"Scheme to defraud" within bank fraud statute is not capable of precise definition but is measured in particular case by determining whether scheme demonstrated departure from fundamental honesty, moral uprightness or fair play and candid dealings in the general life of the community. *United States v. Ragosta*, 970 F. 2d 1085 (2d Cir. 1992), *cert. denied*. The balance in the account was in fact sufficient per federal law to pay 31 of 32 of the checks deceptively dishonored, and the lawful results of the improperly certified check had no effect on the federally

mandated payment of 31 checks had the officers of the bank not been utilizing an unlawful aggregate system of final payment.

Misrepresentation must be material in order to give rise to liability under the bank fraud statute. *United States v. Davis*, 989 F.2d 244 (7th Cir. 1993). Yet incredibly, the trial court hearing a Motion to strike RICO heard of the dual system of final payment and struck the Second Amended Complaint in its entirety including the state cause of action for breach of the Maryland Consumer Protection Act which specifically provides a cause of action for the deceptive wrongful dishonor of the Uniform Commercial Code. Instead the Court found prejudice to the Defendant in spite of the discovery abuses and Motion for sanctions for continued nonproduction of court compelled documents which remained unheard at trial, inclusive of Krystal Fadely's teller records for the month of October 1995 which disclosed the offsetting debit required for federal Settlement requirements of the October 4 double debiting of the improperly certified check which remained out of the escrow account and in an internal account of Allfirst bank for 14 days.

For purposes of the federal bank fraud statute, terms "scheme" and "artifice" include any plan, pattern or cause of action including false or fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from institution to be deceived. Materiality of falsehood is element of federal mail fraud, wire fraud and bank fraud statutes. *Neder v. U.S.*, 527 U.S. 1 (1999).

How much more material can it be, when the direct injury to Petitioner was due to the reversals of federally mandated UCC Paid Items and not the lawful results of an "insufficient balance" created by the effects of an improperly certified check as contended by Respondant of **31** dishonored checks? Yet incredibly, the trial court hearing from defense counsel that ". . . the issue about these dual systems. The Plaintiff somehow suggests that it is – that this is relevant. The Plaintiff herself said, I didn't know about UCC requirements until some years

after I filed the Complaint. That is not the bank's problem that she didn't know that", thereafter, struck the Second Amended Complaint in its entirety and allowed trial to proceed only under the damages issue of § 4-402 – Wrongful dishonor. Respondant having already admitted liability, the effects of the admission of liability and the striking of the Second Amended Complaint in its entirety, including the RICO and the Maryland Consumer Protection Act causes of action, effectively forclosed Petitioner from being able to present the deceptive nature of the dishonors resulting from the federal law violation.

A look at case law analysis to the material misrepresentation presented in this case is appropriate: *United States v. Bonnett*, 877 F.2d 1450 (10th Cir. 1989). Use and treatment of series of worthless checks by immediately crediting depositor when it was known checks were drawn on sufficient funds constituted false representation designed to give impression to bank to which checks were deposited that checks were drawn on collectible funds and would support conviction for obtaining monies or other property of federally insured financial institution by means of false representations; the misrepresentation was not implied representation that checks were good, but conduct of conspirators in acting as if checks were good.

United States v. Ratchford, 942 F.2d 702 (10th Cir. 1991), *cert denied.* Defendant's convictions on three counts of bank fraud were supported by sufficient evidence, despite defendants contention that his bank accounts, when combined, contained sufficient funds on later date to cover checks forming basis of the three counts; relevant inquiry was whether defendant knowingly had sufficient funds in accounts being utilized on day checks were written, and amount contained in those accounts on later date was irrelevant.

CONCLUSION

I respectfully ask this Court to make Respondent answer the question as to whether with compliance of federal law as now evidenced in their Commercial Overdraft System and procedures, 31 checks would have been dishonored on Petitioners Account in 1995.

I further request this court to remand this case back to the Circuit Court for Prince George's County for a trial on the merits of RICO based on the two predicate acts of Bank Fraud 18 U.S.C.A. §§ 1344(1) and (2) and Mail Fraud 18 U.S.C. § 1341 as committed by the General Counsel of Allfirst Bank, Nancy Miller, Esq.

Lastly, I request this Court to admonish the Circuit Court of Prince George's County, where Allfirst Bank, literally has a branch in close proximity to the Court house to fully examine the Motion for Sanctions for failure of Respondents to produce October 20, 2000 Court Compelled production of documents and to sanction until Respondant complies with the Court's order.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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